

No. 13077

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate  
of Radiophone Corporation, Bankrupt,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

On Appeal From the United States District Court for the  
Southern District of California.

---

## BRIEF FOR THE UNITED STATES.

---

ELLIS N. SLACK,

*Acting Assistant Attorney General.*

ROBERT N. ANDERSON,

S. DEE HANSON,

*Special Assistants to the Attorney  
General.*

Department of Justice Building,  
Washington 25, D. C.,

WALTER S. BINNS,

*United States Attorney.*

E. H. MITCHELL,

EDWARD R. McHALE,

*Assistant United States Attorneys.*

312 North Spring Street,  
Los Angeles 12, California,

**FILED**

**DEC 22 1951**

**PAUL P. O'BRIEN**  
**CLERK**



## TOPICAL INDEX

	PAGE
Opinions below .....	1
Jurisdiction .....	2
Question presented .....	4
Statutes involved .....	4
Statement .....	5
Summary of argument.....	6
Argument .....	8
The District Court correctly held that Section 57n of the Bankruptcy Act, as amended, allowing six months for filing claims, and not Section 355 of that Act allowing three months therefor, governs claims of the United States filed in Bankruptcy Proceedings.....	8
Conclusion .....	19
Appendix: Pertinent provisions of the Bankruptcy Act, as amended, the Revised Statutes and the Internal Revenue Code .....	App. p. 1

# TABLE OF AUTHORITIES CITED.

CASES	PAGE
Brezin, In re, 297 Fed. 300.....	11
Brown, W. P., & Sons Lumber Co. v. Commissioner, 38 F. 2d 425; affd., 282 U. S. 283.....	14
Caminetti v. United States, 242 U. S. 470.....	13
Carbon Steel Co. v. Lewellyn, 251 U. S. 501.....	14
Chandler Motors of New England, In re, 17 F. 2d 998.....	11
Dorb The Chemist Pharmacies, In re, 29 Fed. Supp. 832..... .....12, 13, 15, 18	
Dupont de Nemours & Co. v. Davis, 264 U. S. 456.....	14
Ervin Service Corp., In re, 33 Fed. Supp. 653.....	12, 15, 18
Hamilton v. Rathbone, 175 U. S. 414.....	13
Hellmich v. Hellman, 276 U. S. 233.....	13
Knox-Powell-Stockton Co., In re, 100 F. 2d 979.....	19
Magruder v. Safe Deposit & Trust Co. of Baltimore, 121 F. 2d 981 .....	14
Marine Stevedoring Corp., In re, 169 F. 2d 554....	12, 13, 14, 16, 18
Matisoff, In re, 36 Fed. Supp. 896.....	12, 15, 18
Menist, J., Co., In re, 294 Fed. 532.....	11
New York v. Irving Trust Co., 288 U. S. 329..... .....8, 10, 11, 12, 14, 15	
New York v. Saper, 336 U. S. 328.....	19
Parrott v. McLaughlin, 67 F. 2d 397.....	14
Roschen v. Ward, 279 U. S. 337.....	14
South Carolina Produce Ass'n v. Commissioner, 50 F. 2d 742 .....	13, 14
State of Delaware v. Irving Trust Co., 92 F. 2d 17.....	11
United States v. East, 80 F. 2d 134.....	13

	PAGE
United States v. Katz, 271 U. S. 354.....	14
United States v. Whited & Wheless, 246 U. S. 552.....	14
Villere v. United States, 18 F. 2d 409; cert. den., 275 U. S. 532 .....	11
White v. United States, 305 U. S. 281.....	14
Worth Bros. Co. v. Lederer, 251 U. S. 507.....	14

### STATUTES

Bankruptcy Act, Chap. 541, 30 Stat. 544:	
Sec. 55 (11 U.S.C. 1946 ed., Sec. 91) .....	8, 9
Sec. 57 (11 U.S.C. 1946 ed., Sec. 93).....	10
Sec. 64 (11 U.S.C. 1946 ed., Sec. 104).....	4
Sec. 355 (11 U.S.C. 1946 ed., Sec. 755).....	
.....	3, 4, 6, 7, 9, 10, 11, 12, 13, 15, 16, 18
Sec. 376 (11 U.S.C. 1946 ed., Sec. 776).....	4
Sec. 377 (11 U.S.C. 1946 ed., Sec. 777).....	4
Sec. 378 (11 U.S.C. 1946 ed., Sec. 778).....	4
Sec. 659 (11 U.S.C. 1946 ed., Sec. 1059).....	4
Internal Revenue Code, Sec. 3661 (26 U.S.C. 1946 ed., Sec. 3661) .....	12
Revised Statutes:	
Sec. 3466 (31 U.S.C. 1946 ed., Sec. 191).....	12
Sec. 3467 (31 U.S.C. 1946 ed., Sec. 192).....	12

### MISCELLANEOUS

I. T. 1746, II-2 Cum. Bull. 235 (1923).....	11
I. T. 1947, III-1 Cum. Bull. 332 (1924).....	11



No. 13077

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate  
of Radiophone Corporation, Bankrupt,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## BRIEF FOR THE UNITED STATES.

---

### Opinions Below.

The only opinion rendered by the District Court is contained in its unreported order on review of the second order of the Referee in Bankruptcy [R. 25-27] allowing the Collector's claim and setting aside his previous order [R. 21-22] disallowing such claim [R. 33-34]. The only opinion rendered by the Referee in Bankruptcy is contained in his certificate on review to the District Court on the trustee's petition [R. 27-33] to review his second order allowing the Collector's claim [R. 17-18], which is likewise unreported.

## Jurisdiction.

This proceeding arose in the District Court for the Southern District of California upon petition for an arrangement under the provisions of Chapter XI of the Bankruptcy Act, as amended, by the Radiophone Corporation, a California corporation, with its principal place of business in Los Angeles, California, which was filed on August 5, 1947. [R. 3-12.] The order approving the petition as one for relief under Section 322 of the Bankruptcy Act, as amended, and referring the matter to Hubert F. Laugharn, one of the Referees in Bankruptcy, to take such further proceedings as were required by the provisions of the Bankruptcy Act, was entered on the same date. [R. 12-13.] The jurisdiction of the District Court was conferred by Section 2 of the Bankruptcy Act, as amended, and Section 24, Nineteenth, of the Judicial Code. Under date of November 8, 1947, the Referee in Bankruptcy, in the absence of the debtor corporation's presenting a fair or feasible plan of arrangement, and in compliance with the request of the unsecured creditors that an order of adjudication be entered herein, with no one objecting thereto, entered an order under the provisions of Section 377(2) of Chapter XI of the Bankruptcy Act, as amended, adjudicating the debtor, the Radiophone Corporation, a bankrupt. [R. 14, 26.] Under date of March 10, 1950, the successor Referee in Bankruptcy, David B. Head, to whom this matter had been later referred<sup>1</sup> [R. 17], entered an order disallowing the Collector's claim for deficiencies in federal income, excess profits and additional federal unemployment taxes in the

---

<sup>1</sup>While this matter was initially referred to Referee in Bankruptcy Hubert F. Laugharn [R. 13], it was subsequently referred to Referee David B. Head. [R. 17.]



aggregate sum of \$15,196.35 for the year 1945, the taxable period January 1, to July 3, 1946 (and part of 1947 for additional unemployment tax), with interest according to law [R. 19-21], as untimely filed after the expiration of the three months' statutory period provided therefor by Section 355 of the Bankruptcy Act, as amended, but made allowance therefor, under the six months' limitation period provided by Section 57n of that Act, to the extent of any surplus remaining after the payment of the claims already filed and allowed within the three months' statutory period under Section 355. [R. 21-22.] On May 10, 1950, however, the successor Referee in Bankruptcy, pursuant to hearing had on the Collector's motion for reconsideration of his previous order of March 10, 1950, disallowing the Collector's claim, filed together with notice thereof on March 14, 1950 [R. 22-24], entered the second order (including his findings of fact and conclusions of law), setting aside his previous adverse order and allowing the Collector's claim in full, as having been timely filed within the six months' period provided by Section 57n of the Bankruptcy Act, as amended.<sup>2</sup> [R. 25-27.] Thereafter the petition for review of the Referee's second order of May

---

<sup>2</sup>While the trustee-appellant states that the Referee entered this second order "on May 15, 1950" (Br. 4), and the record, apparently through inadvertence, misprint or otherwise, indicates that it was "Dated" on that date [R. 27], the correct date on which it was entered appears to be, as indicated at the end of the document, "Filed May 10, 1950; Referee" [R. 27], as verified in the Referee's Certificate on Review—"4. Findings, Conclusions and Order of May 10, 1950." [R. 18.]

10, 1950, was duly filed by the trustee-appellant on May 23, 1950. [R. 27-33.] Thereupon, the District Court, upon a hearing had on the petition for review, made the order on review confirming the Referee's second order of May 10, 1950, allowing the Collector's claim, which order of the District Court was entered on June 19, 1951. [R. 33-34.] Notice of appeal from this order of the District Court was duly filed by the trustee-appellant on July 17, 1951, pursuant to Section 25a of the Bankruptcy Act, as amended. [R. 34-35.] The jurisdiction of this Court to hear and determine this appeal is conferred by Section 24a of the Bankruptcy Act, as amended, and 28 U. S. C., Section 1291.

### Question Presented.

Whether the six months' limitation period for filing claims in bankruptcy proceedings as provided by Section 57n of the Bankruptcy Act, as amended, which specifically embraces "all claims of the United States," or the three months' period for filing claims generally as provided in Section 355 of that Act which makes no mention of claims of the United States, applies to the Collector's claim for federal taxes asserted against the bankrupt taxpayer.

### Statutes Involved.

The pertinent provisions of the Bankruptcy Act, as amended, the Revised Statutes and the Internal Revenue Code are printed in the Appendix, *infra*.

### Statement.

This is an appeal by the trustee-appellant [R. 34-35] from the order of the District Court [R. 33-34], confirming the second and final order of the Referee in Bankruptcy entered on May 10, 1950, in favor of the Collector. [R. 25-27.] The Referee had initially disallowed the Collector's claim for deficiencies in federal income, excess profits, and unemployment taxes asserted against the bankrupt taxpayer in the total sum of \$15,196.35 for the year 1945, the taxable period January 1 to July 3, 1946, and additional unemployment tax (\$18.58) for 1947, together with interest according to law [R. 19-21], on the ground that it was not timely filed within the three months' statutory period allowed therefor by Section 355 of the Bankruptcy Act, as amended. [R. 21-22.] The Referee, however, upon reconsideration of the matter pursuant to the Collector's motion representing, with supporting authorities, that the United States is not bound by the three months' limitation period on filing claims under Section 355 inasmuch as it is not mentioned specifically in that section, [R. 23-24], entered his second order on May 10, 1950, setting aside and reversing his previous order disallowing the Collector's claim [R. 25-27], and upon so doing, made the following findings of fact upholding the Collector's claim. [R. 25-26.]

Radiophone Corporation filed a petition under Section 322 of the Bankruptcy Act on August 5, 1947. [R. 25.]

An order adjudicating Radiophone Corporation a bankrupt was entered November 8, 1947.<sup>3</sup> The first date set

---

<sup>3</sup>This date was erroneously printed as "November 88, 1947," in the record upon appeal [R. 26], but should correctly read November 8, 1947. [R. 14.]

for the first meeting of creditors after the adjudication was November 26, 1947. [R. 26.]

The claim of the Collector was filed on March 1, 1948, for the sum of \$15,196.35, which date of filing was more than three months after the first date set for the first meeting of creditors after the adjudication, but less than six months after the first date set for the first meeting of creditors. [R. 26.]

Upon these facts, the Referee concluded as a matter of law [R. 26] and held [R. 18], upon the authorities submitted by the Collector [R. 24], that the six months' provision for filing claims as provided by Section 57n of the Bankruptcy Act, as amended, and not the three months' period provided therefor in Section 355 of that Act, applies to claims of the United States, and thereupon entered his order allowing the Collector's claim accordingly. [R. 26-27.] From the order so entered, the trustee-appellant petitioned the District Court for review [R. 27-33], and upon the District Court's entering an order confirming the Referee's second order allowing the claim [R. 33-34], the trustee appealed to this Court for review. [R. 34-35.]

### Summary of Argument.

The District Court affirmed the final order of the Referee in Bankruptcy holding that the six months' limitation period provided in Section 57n of the Bankruptcy Act, as amended, and not the three months' period provided in Section 355 of that Act, for filing claims after the first date set for the first meeting of creditors in bankruptcy proceedings, applies to claims of the Government, and therefore the Collector's claim here was timely filed within the six months' period. This is correct for the 1938

amendment to the Bankruptcy Act expressly includes such claims of the Government in the provisions of Section 57n, and bars them if not filed within six months after the first date for the first meeting of creditors, whereas Section 355 fails to make any mention whatever of claims of the Government. Under these circumstances, Section 355, contrary to the appellant's contentions (Br. 23-25), does not constitute an exception "as otherwise provided in this Act" to the provisions of Section 57n which, as pointed out above, specifically mentions and embraces "all claims of the United States." It is clear, therefore, that Congress, upon enacting the 1938 amendment to the Bankruptcy Act, expressly intended the six months' bar in Section 57n to cover claims of the United States. Equally as clearly, if Congress had intended to make the three months' bar in Section 355 apply to such claims, it would have undoubtedly included them in the latter section instead of in the former. Any other construction of the pertinent terms of the statute would reduce them to empty declarations and render them meaningless, whereas a sensible and reasonable construction, as required by the authorities—if indeed any is needed in view of the unambiguity of the applicable statute—clearly shows that the amendatory provisions of Section 57n are directly applicable to claims of the United States, such as that involved here.



## ARGUMENT.

The District Court Correctly Held That Section 57n of the Bankruptcy Act, as Amended, Allowing Six Months for Filing Claims, and Not Section 355 of That Act Allowing Three Months Therefor, Governs Claims of the United States Filed in Bankruptcy Proceedings.

The sole question presented for decision is whether the six months' limitation period for filing claims in bankruptcy proceedings, as provided by Section 57n of the Bankruptcy Act as amended (Appendix, *Infra*), which specifically embraces "all claims of the United States," or the three months' period for filing claims generally, as provided in Section 355 of that Act (Appendix, *infra*), which makes no mention of claims of the United States, is applicable to the Collector's claim for taxes asserted against the bankrupt taxpayer here. The claim in question was filed more than three months but less than six months after the first date set by the Referee in Bankruptcy (hereinafter called the Referee) for the first meeting of the creditors after the order of adjudication of the bankrupt [R. 26], pursuant to Section 55 of that Act. Therefore, if Section 57n governs, as we contend, the claim was timely filed and properly allowed, whereas if Section 355 is controlling, as the trustee-appellant contends, it was untimely and consequently not allowable.

The District Court, sustaining the Referee's conclusion [R. 18, 26], held on the authority of *New York v. Irving Trust Co.*, 288 U. S. 329, 331, that Section 355 does not govern claims filed by the United States but that Section 57n thereof allowing six months for filing such claims is controlling in respect of the Collector's claim here. [R. 33-34.] The trustee contends that the court below erred

in so holding on the ground that upon a proper interpretation of the statute involved, Congress allegedly intended that the United States and its officers and agencies, as claimants, should be bound by the three months' period provided in Section 355 (Br. 7-14) instead of the six months' limitation in Section 57n. (Br. 23-25.) The argument is that the authorities relied on by the Referee [R. 18, 24] unreasonably construe Section 355 and thus bring about an illogical result not intended by Congress (Br. 15-20); and that the authority relied on by the District Court is not applicable in the construction of Sections 57n and 355 because that case was decided prior to the 1938 amendment to the Bankruptcy Act. (Br. 21-22.) We submit that there is no support in the record for these contentions, and that the District Court's decision is clearly correct.

There is no dispute as to the facts. [R. 17; App. Br. 3-4.] They show that the taxpayer was adjudicated a bankrupt on November 8, 1947 [R. 14, 26]; the first date set by the Referee for the first meeting of creditors after such adjudication pursuant to Section 55 was November 26, 1947 [R. 26]; and that the Collector's claim for federal taxes and accrued interest in the aggregate sum of the \$15,196.35 was filed on March 1, 1948 [R. 19-21], which was more than three months but less than six months after the first date set for the first meeting of the creditors, pursuant to the provisions of Section 55. [R. 26.]

The pertinent provisions of Section 57n of the Bankruptcy Act, as amended, effective September 22, 1938, upon which we rely, specify that—

Except as otherwise provided in this Act, all claims provable under this Act, *including all claims of the*

*United States \* \* \** shall be proved and filed in the manner provided in this section. *Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: Provided, however,* That the court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States \* \* \* ; \* \* \*. (Italics supplied.)

The pertinent provisions of Section 355 of that Act, upon which the appellant relies, however, read as follows:

Upon the entry of an order under the provisions of this chapter directing that bankruptcy be proceeded with, only such claims as are provable under section 63 of this Act shall be allowed and, except as provided in section 354 of this Act, claims not already filed may be filed within three months after the first date set for the first meeting of creditors, held pursuant to section 55 of this Act, or, if such date has previously been set, then within three months after the mailing of notice to creditors of the entry of the order directing that bankruptcy be proceeded with.

Thus it will be noted that the new Section 57n, as amended in 1938, mentions and embraces "all claims of the United States" and "the filing of claims by the United States," whereas Section 355 makes no mention whatever of such claims. It is clear, therefore, that just as the Supreme Court held that "as the United States \* \* \* are not mentioned in the limitation of [the old] Sec. 57 [before the 1938 amendment thereto], they are not bound thereby" (*New York v. Irving Trust Co.*, 288 U. S. 329, 331), so, by a parity of reasoning, the United States can-



not now be bound by Section 355 because it is not mentioned in the three months' limitation of that section, but is plainly bound by the six months' limitation of Section 57n, as amended, because specifically mentioned therein.<sup>4</sup> Under these circumstances, Section 355, contrary to the appellant's contentions (Br. 23-25), does not constitute an exception "as otherwise provided in this Act" to the provisions of Section 57n which, as pointed out above, specifically mentions and embraces "all claims of the United States." Moreover, the affirmative of the negatively-stated provision in Section 57n, that claims of the United States which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed, is necessarily true; hence, it follows that all such claims, as the one herein, which *are* filed within six months after the first date set for the first meeting of creditors, are allowable. Further showing that Section 57n alone, exclusive of Section 355, governs all claims of the United States is the specific provision therein that while such claims must be filed within the six months' period specified therein in order to be allowable, nevertheless the court may, upon timely application and cause

---

<sup>4</sup>Before the 1938 amendment to the Bankruptcy Act, Section 57n had no application to the United States, and therefore it operated in no way as a bar to the collection of federal taxes. I. T. 1746, II-2 Cum. Bull. 235 (1923); I. T. 1947, III-1 Cum. Bull. 332 (1924); *New York v. Irving Trust Co.*, 288 U. S. 329, 331; *State of Delaware v. Irving Trust Co.*, 92 F. 2d 17, 19 (C. A. 2d); *Villere v. United States*, 18 F. 2d 409 (C. A. 5th), certiorari denied, 275 U. S. 532; *In re Chandler Motors of New England*, 17 F. 2d 998 (Mass.); *In re Brezin*, 297 Fed. 300 (N. J.); *In re J. Menist Co.*, 294 Fed. 532 (C. A. 2d). Hence, we can conceive of nothing more clearly showing the direct applicability of Section 57n, as amended, to the United States in view of the specific inclusion of claims of the United States therein, not so included before the 1938 amendment.

shown before the expiration of such period, grant a reasonable fixed extension of time for the *filing of claims by the United States*. In these circumstances, it is clear that, contrary to the appellant's contentions, the United States plainly cannot be bound by the three months' limitation in Section 355 which is completely silent in respect of claims of the United States, but only by Section 57n specifically including such claims. This the District Court properly held. [R. 33-34.] (*New York v. Irving Trust Co.*, 288 U. S. 329, 331; *In re Marine Stevedoring Corp.*, 169 F. 2d 554, 555-556 (C. A. 3d); *In re Dorb The Chemist Pharmacies*, 29 Fed. Supp. 832, 833-834 (S. D. N. Y.); *In re Ervin Service Corp.*, 33 Fed. Supp. 653, 654-655 (W. D. N. Y.); *In re Matisoff*, 36 Fed. Supp. 896, 897 (N. D. Ga.); Compare Sections 3466 and 3467 of the Revised Statutes, and Section 3661 of the Internal Revenue Code (all Appendix, *infra*). Accordingly, there is no support in this record for the appellant's contention that Congress allegedly intended that the three months' limitation of Section 355 should replace the six months' period provided by Section 57n in respect of claims of the United States, on the ground that there is no indication of intent to preserve the six months' period of the latter section for any purpose. (Br. 14.) Significantly, the appellant cites no authority for such incongruous contention. As shown, the contrary is true.

Nor is there any support for the appellant's contention that the legislative history of Sections 57n and 355 indicates that Government claims—specifically embraced in Section 57n, as shown—should be subjected to the same requirements as are other claims generally under Section 355. (Br. 10-14.) In the first place, the provisions of Section 57n are so clear, unambiguous and free from

doubt that resort to the legislative history and statutory construction is, contrary to the trustee's contentions (Br. 8), wholly unnecessary here. (*Caminetti v. United States*, 242 U. S. 470, 485-486.) As has been aptly held, "While rules of statutory construction are applied to solve doubts, they are not applied to create them, and, where there is no ambiguity [as here], there is no need for either a liberal or strict construction." (*South Carolina Produce Ass'n v. Commissioner*, 50 F. 2d 742, 744 (C. A. 4th), citing *Hamilton v. Rathbone*, 175 U. S. 414, 421.) Moreover, there is nothing in the legislative history cited by the appellant or otherwise which indicates, directly or indirectly, that it was the intention of Congress that the Government should be bound by the general statutory provisions of Section 355 which limit the time to three months for filing claims in bankruptcy. (*In re Marine Stevedoring Corp.*, 169 F. 2d 554, 555-556 (C. A. 3d); *United States v. East*, 80 F. 2d 134, 135 (C. A. 8th).) On the contrary, Section 57n embracing "all" claims of the United States is clearly a *special* provision governing such claims, exclusive of Section 355. (*In re Marine Stevedoring Corp.*, *supra*, pp. 555-556.) Such special provisions always prevail over general provisions of a statute. (*Hellmich v. Hellman*, 276 U. S. 233, 236-238.) It is quite clear, moreover, that if, as contended by the appellant (Br. 6, 10-14), Congress had intended that the United States be bound by the provisions of Section 355, instead of Section 57n in which claims of the Government are specifically included, it would undoubtedly have so stated in the former instead of specifically providing therefor by the 1938 amendment in the latter. (*In re Marine Stevedoring Corp.*, *supra*, p. 556; *In re Dorb The Chemist Pharmacies*, 29 Fed. Supp. 832, 834 (S. D. N. Y.).)

In these circumstances, if effect were given to the appellant's claimed construction, it is clear that the specific provisions embracing *all* claims of the United States in Section 57n would be reduced to empty declarations and thereby rendered meaningless. This is not permissible (*Carbon Steel Co. v. Lewellyn*, 251 U. S. 501, 505; *Worth Bros. Co. v. Lederer*, 251 U. S. 507, 510) for "there is no canon against using common sense in construing laws [such as Section 57n here] as saying what they obviously mean" (*Roschen v. Ward*, 279 U. S. 337, 339). While a sensible and reasonable construction—if any were warranted or needed here—is required (*United States v. Katz*, 271 U. S. 354, 362), nevertheless, without any construction, the clear terms of the statute lead irrefragably to the obvious conclusion that the six months' provision of Section 57n is directly applicable to the claim of the United States here in controversy. [R. 19-21.] Finally, since Section 57n imposes limitations on claims of the United States, it must be strictly construed in favor of the United States in order to facilitate the collection of taxes. (*Parrott v. McLaughlin*, 67 F. 2d 397, 398-399 (C. A. 9th), citing, to the same effect, *United States v. Whited & Wheless*, 246 U. S. 552, 561, and *Dupont de Nemours & Co. v. Davis*, 264 U. S. 456, 462; see also *White v. United States*, 305 U. S. 281, 292; *W. P. Brown & Sons Lumber Co. v. Commissioner*, 38 F. 2d 425, 428 (C. A. 6th), affirmed, 282 U. S. 283; *Magruder v. Safe Deposit & Trust Co., of Baltimore*, 121 F. 2d 981 (C. A. 4th); *South Carolina Produce Ass'n v. Commissioner*, 50 F. 2d 742, 744 (C. A. 4th).)

In the light of the foregoing, we submit that the issue here is concluded by *New York v. Irving Trust Co.*, 288 U. S. 329; *In re Marine Stevedoring Corp.*, 169 F. 2d

554 (C. A. 3d); *In re Dorb The Chemist Pharmacies*, 29 Fed. Supp. 832 (S. D. N. Y.); *In re Ervin Service Corp.*, 33 Fed. Supp. 653 (W. D. N. Y.); *In re Matisoff*, 36 Fed. Supp. 896 (N. D. Ga.). The latter four cases were cited by the Collector in support of his motion for reconsideration of the Referee's initial order previously disallowing the claim in question [R. 23-24], adopted and followed by the Referee in his certificate on review [R. 17-18] as supporting his second and final order of May 10, 1950, upholding the validity of the Collector's claim [R. 25-27], and also followed by the District Court, in affirming the Referee's final decision in favor of the Collector, on the authority of *New York v. Irving Trust Co.*, *supra*.

The *New York-Irving Trust Co.* case held (p. 331), as the appellant states (Br. 21), that since the United States was not mentioned in the limitation of the old Section 57n, before the 1938 amendment thereto, it was admittedly not bound by the provisions thereof. Hence, as shown, the United States is likewise not bound by the provisions of Section 355 of the Bankruptcy Act, as amended, for it is not mentioned therein. This plainly negatives the appellant's contention that the District Court's reliance on that case was erroneous on the ground that it was decided before the 1938 amendment to the Bankruptcy Act. (Br. 5, 6, 21-22.) The conclusion is inescapable that if the Supreme Court's ruling that the United States was not bound by the provisions of the old Section 57n (before the 1938 amendment thereto) because it was not mentioned therein, be accepted as binding under the circumstances there—and the appellant does not dispute the correctness



thereof (Br. 21-22)—then it necessarily must follow for the same reason that the United States is not now bound by the provisions of Section 355 here because it is not mentioned therein.

The Third Circuit's decision in the *Marine Stevedoring Corp.* case, *supra*, is on all fours with the present case, as observed by the Referee in reviewing and reversing his prior decision against the Collector. [R. 18.] All his previous doubts in respect of the correctness of the three District Courts' decisions, *supra*, reversing the respective Referees' orders therein holding that Section 355, instead of Section 57n, applied to claims of the United States, vanished upon his being confronted with the decision of the Third Circuit in the *Marine Stevedoring Corp.* case. [R. 18.] In the latter case, an order was entered on May 12, 1944, withdrawing the plan of arrangement purported to have been effected under Chapter XI of the Bankruptcy Act, as amended by the Act of June 22, 1938, Chap. 575, 52 Stat. 840, and adjudicating the debtor a bankrupt, and the trustee was appointed by the Referee in Bankruptcy. Since the Referee had failed to set a date for the first meeting of the creditors with notice thereof, however, the appellate court vacated the judgment of the District Court and remanded the case with directions for the Referee in Bankruptcy to set a date for the first meeting of the creditors, pursuant to Section 55 of the Bankruptcy Act, as amended. Upon so doing, the court stated in respect of Section 355 (pp. 555-556):

\* \* \* all creditors, save those who have special status by reason of the provisions of Section 57, sub. n of the Bankruptcy Act, to be dealt with hereinafter, must file their claims within three months as required by Section 355 if not filed during the course of the Chapter XI proceeding. \* \* \*

The court's further holdings in respect to Section 57n (p. 556) are directly in point and so apt that they are quoted at length:

Claims of the United States or of any State or subdivision thereof are awarded a special period for filing under Section 57, sub. n \* \* \*. Claims of the United States are barred only under Section 57, sub. n, which bars them if not filed within six months after the first date set for the first meeting of creditors unless an extension be procured as provided by the statute. In this connection attention is called to the well considered opinion of Judge Goddard in *In re Dorb The Chemist Pharmacies*, D.C.S.D.N.Y., 29 F. Supp. 832, 833, 834, in which it is stated: "Section 57, sub. n, of the Bankruptcy Act was amended by the Chandler Act, 11 U.S.C.A. Sec. 93, sub. n, to provide that all claims, including claims of the United States, or any state or subdivision thereof, must be filed within a six months' period. The amendment expressly includes them so as to bar such claims after six months. Such claims are barred only under Sec. 57, sub. n, of the Bankruptcy Act which bars them if not filed within six months after the first date set for the first meeting of creditors. Evidence that the Congress intended the six months' period to apply to such claims when reorganization under Chapter XI failed and adjudication ordered, is found in Sec. 378, sub. 2 of the Bankruptcy Act, 11 U.S.C.A. Sec. 778, sub. 2, which provides that when in Chapter XI proceeding, bankruptcy is directed to be proceeded with, the proceeding thereof shall be conducted as far as possible 'in the same manner and with like effect as if a bankruptcy petition for adjudication in bankruptcy had been filed \* \* \*.' It seems clear therefore that the Congress in enacting the Chandler Act expressly intended the six months' bar to cover claims

of the United States, a state, or a municipality, for if the Congress had desired to make the three months' bar apply to such claims, it would undoubtedly have included them in Sec. 355."

To the same effect, see *In re Ervin Service Corp.*, 33 Fed. Supp. 653 (W.D.N.Y.) and *In re Matisoff*, 36 Fed. Supp. 896 (N. D. Ga.) [R. 18, 24], both of which, following *In re Dorb The Chemist Pharmacies*, 29 Fed. Supp. 832 (S.D. N.Y.), reversed the Referees' erroneous orders holding that Section 355, instead of Section 57n, applied to claims of the United States; and therefore they, like the *Dorb The Chemist Pharmacies* case, are in harmony with the Third Circuit's decision in the *Marine Stevedoring Corp.* case, *supra*.

The foregoing cases, we submit, completely negative all the appellant's contentions to the contrary here. Substantially all the contentions and arguments offered by the appellant here were presented and overruled by the courts in those cases, and the appellant has furnished no authority to the contrary. It is quite apparent that the appellant's criticism (Br. 15-20) of the rationale of the *Marine Stevedoring Corp.* case, which adopted in large part the sound and persuasive reasoning of the District Court in the *Dorb The Chemist Pharmacies* case, *supra*, is self-serving, without basis, and clearly untenable. Moreover, there is no basis in the record, nor does the appellant cite any *applicable* authority for his contradictory statements (Br. 15, 16, 20), that the court in neither case actually "construed and interpreted" the statutory provisions involved (Sections 57n and 355), and that therefore "such constructions and interpretations" by the Third Circuit in the *Marine Stevedoring Corp.* case are unreasonable and effect illogical and mischievous results, not intended by



Congress. (Br. 15-20.) The decisions referred to clearly show the contrary.

The many cases cited by the appellant in support of his position (Br. 14, 22), such as *New York v. Saper*, 336 U. S. 328, and *In re Knox-Powell-Stockton Co.*, 100 F. 2d 979 (C.A. 9th), for example, are clearly distinguishable. They involved issues and factual situations not presented here.

### Conclusion.

The order of the District Court, affirming the final order of the Referee in Bankruptcy in favor of the Collector, is correct and should therefore be affirmed upon review by this Court.

Respectfully submitted,

ELLIS N. SLACK,  
*Acting Assistant Attorney General.*

ROBERT N. ANDERSON,  
S. DEE HANSON,  
*Special Assistants to the Attorney  
General.*

WALTER S. BINNS,  
*United States Attorney.*

E. H. MITCHELL,  
EDWARD R. McHALE,  
*Assistant United States Attorneys.*

December, 1951.







## APPENDIX.

Bankruptcy Act, c. 541, 30 Stat. 544 [as amended by Sec. 1 of the Act of June 22, 1938, c. 575, 52 Stat. 840]:

SEC. 55. *Meetings of Creditors.*—a. The court shall cause the first meeting of the creditors of a bankrupt to be held not less than ten nor more than thirty days after the adjudication \* \* \*. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

\* \* \* \* \*

[11 U. S. C. 1946 ed., Sec. 91.]

SEC. 57. *Proof and Allowance of Claims.*— \* \* \*

\* \* \* \* \*

n. Except as otherwise provided in this Act, all claims provable under this Act, including all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: *Provided, however,* That the court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any State or subdivision thereof: \* \* \*. When in any case all claims which have been duly allowed have been paid in full, claims not filed within the time hereinabove prescribed may nevertheless be filed within such time as

the court may fix or for cause shown extend and, if duly proved, shall be allowed against any surplus remaining in such case.

[11 U. S. C. 1946 ed., Sec. 93.]

SEC. 64. *Debts Which Have Priority.*—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be \* \* \*; (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof; *Provided*, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further*, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; \* \* \*

\* \* \* \* \*

[11 U. S. C. 1946 ed., Sec. 104.]

SEC. 355. Upon the entry of an order under the provisions of this chapter directing that bankruptcy be proceeded with, only such claims as are provable under section 63 of this Act shall be allowed and, except as provided in section 354 of this Act, claims not already filed may be filed within three months after the first date set for the first meeting of creditors, held pursuant to section 55 of this Act, or, if such date has previously been set, then within three months after the mailing of notice to creditors of the entry of the order directing that bankruptcy be proceeded with.

[11 U. S. C. 1946 ed., Sec. 755.]

SEC. 376. If an arrangement is withdrawn or abandoned prior to its acceptance, or is not accepted at the meeting of creditors or within such further time as the court may fix, or if the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused, the court shall—

\* \* \* \* \*

(2) where the petition was filed under section 322 of this Act, enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors.

[11 U. S. C. 1946 ed., Sec. 776.]

SEC. 377. Where the court has retained jurisdiction after the confirmation of an arrangement and the debtor defaults in any of the terms thereof or the arrangement terminates by reason of the happening of a condition specified in the arrangement, the court upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct shall—

\* \* \* \* \*

(2) where the petition has been filed under section 322 of this Act, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the

proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors.

[11 U. S. C. 1946 ed., Sec. 777.]

SEC. 378. Upon the entry of an order directing that bankruptcy be proceeded with—

\* \* \* \* \*

(2) in the case of a petition filed under section 322 of this Act, the proceeding shall be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter was filed; and the trustee nominated by creditors under this chapter shall be appointed by the court, or, if not so nominated or if the trustee so nominated fails to qualify within five days after notice to him of the entry of such order, a trustee shall be appointed as provided in section 44 of this Act.

[11 U. S. C. 1946 ed., Sec. 778.]

SEC. 659. In advance of distribution to creditors, there shall first be paid in full, out of the moneys paid in by or for the debtor, and the order of payment shall be—

\* \* \* \* \*

(6) the debts entitled to priority, in the order of priority, as provided by subdivision *a* of section 64 of this Act.

[11 U. S. C. 1946 ed., Sec. 1059.]



Revised Statutes:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

[31 U. S. C. 1946 ed., Sec. 191.]

SEC. 3467 [as amended by Sec. 518(a) of the Revenue Act of 1934, c. 277, 48 Stat. 680, 760]. Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

[31 U. S. C. 1946 ed., Sec. 192.]

Internal Revenue Code:

SEC. 3661. ENFORCEMENT OF LIABILITY FOR TAXES  
COLLECTED.

Whenever any person is required to collect or withhold any internal-revenue tax from any other person and to pay such tax over to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

[26 U. S. C. 1946 ed., Sec. 3661.]